INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Arnold v. *United States*, 382 F. 2d 4 — 7

Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U.S. 692 — 9

Foster v. *Medina*, 170 F. 2d 632, certiorari denied, 335 U.S. 909 — 10

Glasser v. *United States*, 315 U.S. 60 — 10

Holden v. *United States*, 388 F. 2d 240, certiorari denied, 393 U.S. 864 — 8

Knowles v. *United States*, 224 F. 2d 168 — 8

Lerma v. *United States*, 387 F. 2d 187 — 7

Nye and Nissen v. *United States*, 336 U.S. 613 — 6

Quercia v. *United States*, 289 U.S. 466 — 10

Rodriguez-Sandoval v. *United States*, 409 F. 2d 529 — 8

United States v. *Cohen*, 384 F. 2d 699 — 6

United States v. *Edwards*, 366 F. 2d 853, certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908 — 8

United States v. *Ghaloub*, 385 F. 2d 567 — 7

United States v. *Godel*, 361 F. 2d 21, certiorari denied, 385 U.S. 838 — 10

384-334—70

Cases—Continued

	Page
United States v. *Goitia*, 409 F. 2d 524	8
United States v. *Gulley*, 404 F. 2d 534	10
United States v. *Knox Coal Company*, 347 F. 2d 33, certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904	9
United States v. *Lester*, 363 F. 2d 68, certiorari denied, 385 U.S. 1002	6
United States v. *Lyon*, 397 F. 2d 505, certiorari denied *sub nom. Lysczyk* v. *United States*, 393 U.S. 846	9
United States v. *Stayback*, 212 F. 2d 313	10
Walker v. *Bishop*, 408 F. 2d 1378	10
Walsh v. *United States*, 371 F. 2d 135, certiorari denied, 388 U.S. 915	9
Statute:	
18 U.S.C. 2421	2

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1400

EDWARD L. COFONE, LEONARD MALAGRINO, JOHN E. SELVIDIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1970. A petition for rehearing was denied on February 9, 1970. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 9, 1970, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a record of the prostitute's daily earnings, entered in a portion of a book labeled "Marquette Diary 1968", was properly admitted into evidence.

2. Whether petitioner Malagrino, who, the evidence showed, acted as an aider and abettor, was properly charged as a principal to the interstate transportation of a female for the purpose of prostitution.

3. Whether the trial court erred in declaring hostile a government witness and permitting the government to cross-examine her.

4. Whether the prosecution's closing argument, with respect to which no objection was made at trial, constituted plain error.

5. Whether the remarks and conduct of the trial judge during the trial were proper.

STATEMENT

After a jury trial in the United States District Court for the District of Rhode Island, petitioners were convicted on a one-count indictment which charged them with transporting a female in interstate commerce for immoral purposes in violation of 18 U.S.C. 2421. On June 20, 1969, each was sentenced to two years' imprisonment. The court of appeals affirmed.

The evidence showed that in January 1968 one Shirley Crepeau, a seventeen-year-old indigent living alone in Willimantic, Connecticut (1 R. 148–150),[1] was driven

[1] "R." preceded by the volume number refers to the four-volume record on file with the Clerk of this Court. The first two

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by a friend, Miss Hillary McAneeny, to a bowling alley in Westerly, Rhode Island, where the girls met petitioners Cofone and Selvidio (1 R. 154, 287). The two couples spent the night in adjoining rooms in the Bond Hotel in Westerly (1 R. 155, 170, 295). In the morning, Miss McAneeny drove Shirley Crepeau back to Connecticut (1 R. 153–157, 163–165, 296). Cofone and Selvidio followed later that day and met Miss Crepeau again (1 R. 282, 297). Other meetings in Connecticut and other trips to Rhode Island followed (1 R. 160, 170–171). Selvidio suggested to Miss Crepeau that she come to Westerly to work as a prostitute but initially she declined (1 R. 301; 2 R. 440). In late January or early February, Miss Crepeau again was driven to Westerly and was there introduced by Cofone and Selvidio to petitioner Malagrino (1 R. 311). Malagrino was the operator or manager of the Bond Hotel and employed Cofone as a barber in his hotel barbershop (1 R. 281, 333; 2 R. 444–456). On this occasion, Malagrino asked Miss Crepeau to work in the hotel as a prostitute (1 R. 177; 2 R. 415). She declined and was later driven back to Connecticut (1 R. 178–181; 2 R. 416, 442, 447). All three petitioners on various occasions thereafter asked her to work in Westerly as a prostitute (1 R. 177–179, 185; 2 R. 446–447).

On February 16, 1968, Selvidio drove Miss Crepeau from Connecticut to Rhode Island. En route, he again asked her if she would be a prostitute at the Bond

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volumes, consecutively paginated, contain the trial transcript. The third volume, entitled "Appendix to Briefs" contains the exhibits admitted at trial. Volume 4 contains the court of appeals record.

Hotel in Westerly (1 R. 183). At Westerly they met with Cofone and the three of them discussed the matter (1 R. 185, 321). The next day, they met with Malagrino at the Bond Hotel and the four of them discussed the arrangements to be made (1 R. 187), including Miss Crepeau's compensation for her work (2 R. 417–421). After this she started to work at the Bond Hotel as a prostitute. The arrangements involved pictures of Miss Crepeau, taken in the nude, at defendant Malagrino's instigation (1 R. 224). These were kept in a drawer in the barbershop of the hotel and shown to prospective patrons by petitioners Malagrino and Cofone (1 R. 225, 234–235). Miss Crepeau received free meals, a credit certificate for clothing,[2] abatement after the first week of all rent charges at the hotel, and a portion of her earnings as a prostitute (1 R. 190, 218; 2 R. 421–432). The balance of her earnings went to Cofone and Selvidio (1 R. 192; 2 R. 410).

Initially, Miss Crepeau kept a record of her earnings in a book she had labeled "Marquette Diary 1968" (Govt. Ex. 6). Money was usually paid by patrons directly to Malagrino or Cofone, but sometimes she personally received the cash. In either event, during February 1968, Miss Crepeau contemporaneously recorded her earnings, her gross receipts for the various days, and the planned distribution of receipts (1 R. 191, 193, 209–210, 216). The court ruled the diary was admissible, with any discrepancy or

[2] Malagrino gave Miss Crepeau one credit certificate. She made a purchase and her merchandise slip from the store became Government Exhibit 7 (see *infra*). The credit certificate, in the amount of $25, was deducted from her earnings (1 R. 190).

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error as to dates or amounts going merely to the evidentiary weight to be given the exhibit (1 R. 214).

Miss Crepeau turned over to police a sales slip, dated March 2, 1968, from a ladies' apparel shop in Westerly (Govt. Ex. 7), which indicated she had made a purchase by using a credit certificate (1 R. 218, 221). She also turned over the three nude pictures of herself which she had retrieved from the drawer in the hotel barbershop (Govt. Ex. 8; 1 R. 226; 2 R. 478). A torn parking-lot receipt (Govt. Ex. 9) marked "paid" was also turned over by her, purportedly to corroborate her explanation of the method by which Cofone and Malagrino informed her they had already received payment of her fee (1 R. 236–239).

ARGUMENT

1. Petitioners claim the book entitled "Marquette Diary 1968", containing a record of Miss Crepeau's daily earnings while at the Bond Hotel, should not have been admitted into evidence (Pet. 4–5). As the court of appeals pointed out, this book was not a diary in the dictionary sense of a record of daily events and activities (Pet. App. 12). Rather, it was used by Miss Crepeau as a combination account, address, and anniversary-reminder book (See 3 R. 75–112). In it (Govt. Ex. 6) she recorded entries as to her daily earnings, her gross receipts and the planned distribution of her income. The fact that the book had been printed-for-sale as a diary, and could have been used for that purpose, has no bearing on the admissibility of its contents in this case. The account-

ing notations were made by Miss Crepeau for business purposes, and were maintained as a natural part of her mode of obtaining a livelihood. Accordingly, the book was admissible either as a business entry or as past recollection recorded. See *United States* v. *Cohen,* 384 F. 2d 699, 701 (C.A. 2). Moreover, this record was not the only item which corroborated Miss Crepeau's trial testimony as to her prostitution activities. Other exhibits, to which petitioners make no objection here, indicated she had lived at the Bond Hotel from mid-February until near the end of March, working there for petitioners as a prostitute (see Govt. Exs. 1–3, 7–11).

2. Although the precise thrust of the argument here by petitioner Malagrino is less than clear (Pet. 6–7), he seems to contend he suffered some prejudice because the government's bill of particulars referred to him as a "principal" while the evidence adduced at trial established he was in fact an "aider and abettor". We cannot perceive how Malagrino was in any way prejudiced. It is clear that one who aids and abets may be charged as a principal. See, *e.g., Nye and Nissen* v. *United States,* 336 U.S. 613, 619–620; *United States* v. *Lester,* 363 F. 2d 68, 72 (C.A. 6), certiorari denied, 385 U.S. 1002. As we have shown in the Statement, *supra,* the evidence showed a common enterprise, with each petitioner making his contribution to the success of the scheme to transport Miss Crepeau across state lines for the purpose of prostitution.

3. As one of its first witnesses, the prosecution called Miss McAneeny, the girl who had first driven Miss Crepeau to Rhode Island (1 R. 61–82). When this

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witness evinced difficulty recalling significant dates (1 R. 82–97), the prosecutor expressed his surprise at her testimony in light of her earlier responses before the grand jury and indicated a desire to subject her to cross-examination (1 R. 98); after some further difficulty, the court ruled Miss McAneeny was a hostile witness who had "avoided questions and given most indefinite answers" (1 R. 105) and accordingly it allowed the government cross-examination.

The trial court's action in this regard was well within its discretion. *United States* v. *Ghaloub,* 385 F. 2d 567 (C.A. 2); *Lerma* v. *United States,* 387 F. 2d 187, 190 (C.A. 8). Moreover, if any error resulted, it was harmless error. For, once it was ascertained that Miss McAneeny's grand jury testimony had not been recorded, no effort was made to inject any prior extrajudicial statements into the record and the trial court specifically instructed the jury to disregard any reference to Miss McAneeny's grand jury appearance (1 R. 102–103). See *Arnold* v. *United States,* 382 F. 2d 4, 8 (C.A. 9). In addition, the testimony given by this witness when cross-examined by the government was no more than a reiteration of her testimony in response to questions by counsel for the defense; that is, that on or about the date alleged in the indictment, she had transported Miss Crepeau across state lines, and she was certain Miss Crepeau had thereafter remained in Rhode Island.

4. The closing argument of government counsel (to which no objection was made at trial) cannot be considered a comment upon the "silence" at trial of either Cofone or Malagrino. Clearly, the language

used was not "manifestly intended or * * * of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); see also, *Rodriguez-Sandoval* v. *United States*, 409 F. 2d 529, 531 (C.A. 1). Indeed, it was defense counsel who in closing argument attacked Miss Crepeau's credibility (2 R. 673–680) and rhetorically asked as to the whereabouts of other people the F.B.I. had investigated in this case (2 R. 670).[3] In this context, the prosecutor asked the jury also to consider why the defense had not called witnesses to refute Miss Crepeau's testimony.[4] The trial judge, in his instructions to the jury, made it plain that a defendant was not required to testify and his failure to do so was to be given no consideration whatsoever in the jury's deliberations. There was thus no error in these circumstances. See *United States* v. *Goitia*, 409 F.2d 524, 528 (C.A. 1); *Holden* v. *United States*, 388 F.2d 240 (C.A. 1), certiorari denied, 393 U.S. 864; *United States* v. *Edwards*, 366 F.2d 853, 871 (C.A. 2),

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[3] This was in apparent reference to Ponzi Cellino (Pet. 14–15), a local police officer who had been questioned by the F.B.I. but had denied having relations with Miss Crepeau at the Bond Hotel. He was not called as a witness by either side.

[4] Two potential rebuttal witnesses (other than petitioners) who could have been used were (1) the custodian of the hotel records, whose testimony might have been helpful to establish that Miss Crepeau was a bona fide registered guest, and (2) police officer Ponzi Cellino, whose name appeared in Miss Crepeau's little book but who denied having relations with her at the Bond Hotel.

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certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908; *United States* v. *Knox Coal Company*, 347 F.2d 33 (C.A. 3), certiorari denied *sub nom. Lippi* v. *United States*, 382 U.S. 904; *United States* v. *Lyon*, 397 F.2d 505 (C.A. 7), certiorari denied *sub nom. Lyszyk* v. *United States*, 393 U.S. 846; *Baker* v. *United States*, 115 F.2d 533 (C.A. 8), certiorari denied, 312 U.S. 692; *Walsh* v. *United States*, 371 F.2d 135 (C.A. 9), certiorari denied, 388 U.S. 915.

Nor was the government argument inflammatory. It sought to reply to the defense counsel's characterization of Miss Crepeau as a tough, vicious woman intent on revenge and hence unworthy of belief (2 R. 677–680). Government counsel was entitled to argue the contrary was true.

5. It is urged the trial judge interfered with the defense examination of witnesses and hurried and unfairly characterized the defense (Pet. 8–9). None of these contentions has merit. The court did direct questions to the witnesses but generally this occurred only when witnesses appeared to be confused or defense counsel's line of questioning was improper (*e.g.*, 1 R. 163, 177; 2 R. 453). For example, during extensive cross-examination of Miss Crepeau, defense counsel repeatedly confused voir dire examination as to the admissibility of exhibits with cross-examination going to the merits (*e.g.*, 1 R. 204–205, 211–212, 233). Moreover, on cross-examination of the F.B.I. agent, questions directed to what a suspected bordello customer, Ponzi (who happened to be a local police officer), may have told the agent as to his own innocence was not a proper subject for interrogation (see Pet. 14–15, 2 R. 520–

521). Admittedly, the court did ask defense counsel to refrain from making speeches (1 R. 74); however, such request was but a part of the court's efforts to impress counsel with the need for brevity (1 R. 98, 100; 2 R. 566, 601, 609). And while the court found it necessary to admonish counsel several times (*e.g.*, 1 R. 163, 168, 212, 270, 344; 2 R. 601), such corrections are part of the normal "give and take" of criminal trials. *United States* v. *Gulley*, 404 F. 2d 534, 536 (C.A. 7); *United States* v. *Stayback*, 212 F. 2d 313, 319 (C.A. 3). When considered in the context of the present lengthy trial, with excitable and energetic counsel insisting on making his record, the usually terse remarks of the court were not inappropriate See *Walker* v. *Bishop*, 408 F. 2d 1378, 1382 (C.A. 8); *Foster* v. *Medina*, 170 F. 2d 632, 633 (C.A. 2), certiorari denied, 335 U.S. 909. In short, the trial court here properly exercised its judicial responsibility of insuring a full and fair trial. *Glasser* v. *United States*, 315 U.S. 60, 82; *Quercia* v. *United States*, 289 U.S. 466, 469; *United States* v. *Godel*, 361 F. 2d 21, 24 (C.A. 4), certiorari denied, 385 U.S. 838.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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